

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)
) **NAL/Acct. No. 915ST0001**
Supervalu, Inc.)
Minneapolis, Minnesota)

MEMORANDUM OPINION AND ORDER

Adopted: February 8, 2000

Released: February 9, 2000

By the Chief, Enforcement Bureau:

1. In this Order, we reaffirm a monetary forfeiture of \$11,000 issued by the former Compliance and Information Bureau to Supervalu, Inc. for operating an unlicensed radio facility even after it was directed to cease operations. The Notice of Apparent Liability ("NAL") in this case was issued October 8, 1998.¹ The Forfeiture Order was issued January 19, 1999.² Supervalu has filed a Motion to Set Aside the *Forfeiture Order*. For purposes of review, Supervalu's Motion will be considered as a petition for reconsideration under Section 1.106 of the Commission's Rules ("the Rules"), 47 C.F.R. § 1.106. For the reasons discussed below, we deny the petition for reconsideration.

BACKGROUND

2. On September 9, 1998, the Commission's Seattle, Washington Field Office investigated a complaint of interference to a private land mobile repeater station located near Enumclaw, Washington, which uses an input frequency of 469.950 MHz. The source of the interference was determined to be located at Supervalu's distribution center, 1525 East D Street, Tacoma, Washington, on nominal frequency 469.9625 MHz. An inspection of Supervalu's inventory control equipment revealed that the operating bandwidth exceeded that of a standard voice channel and was sufficient to cause adjacent channel interference. During the inspection, Supervalu's employees could not produce a valid FCC radio license or any other authorization for Supervalu's transmissions on 469.9625 MHz.³

3. On September 10, 1998, a letter was sent via facsimile to the attention of Brad Colbo, the person responsible for the radio equipment at Supervalu's Tacoma distribution center, informing Supervalu that the unlicensed operation on 469.9625 MHz violated Section 301 of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. § 301, and instructing Supervalu to discontinue the unlicensed operation immediately. That same day, Mr. Colbo called the Seattle Field Office to discuss the matter. During the conversation, the District Director of the Seattle Field Office agreed to send

¹ NAL (FCC Seattle Field Office, released October 8, 1998).

² 14 FCC Rcd 856 (Compl. & Inf. Bur., 1999). Although counsel for Supervalu had submitted to the Commission a timely response to the October 8, 1998 NAL, the staff did not actually receive that response until April 15, 1999. The January 19, 1999 Forfeiture Order, therefore, was issued in the mistaken belief that Supervalu was in default. The issues addressed in this Order are those raised by Supervalu's response to the NAL.

³ A radio license for a different frequency and mode of operation, issued to Supervalu's previous owner, West Coast Grocery, was posted at the site during the inspection.

information to Supervalu's corporate office regarding the application process for Special Temporary Authority ("STA") to operate its radio transmitter. The requested information was sent via facsimile to the attention of Steve Pederson at Supervalu's corporate office in Minneapolis, Minnesota that same week.

4. On September 18, 1998, the complainant notified the Seattle Field office that the interference was still occurring. On September 21, 22, and 23, 1998, Supervalu contacted the Seattle Field Office and stated that it was working on the interference problem. Supervalu was again advised that fines might be assessed if it did not cease operating. Supervalu was urged to apply for a license or STA to operate on 469.9625 MHz. The STA application information was again sent via facsimile to Supervalu's corporate office on September 23, 1998.

5. On September 23, 1998, Supervalu submitted an application for an STA via facsimile to the Licensing Division of the FCC's Wireless Telecommunications Bureau ("WTB") in Gettysburg, Pennsylvania. Subsequently, on September 25, 1998, an agent from the Seattle Field Office conducted a follow-up investigation and determined that Supervalu was still transmitting on 469.9625 MHz from 1525 East D Street in Tacoma, Washington without a valid station license or other authority. Shortly thereafter, on October 1, 1998, the complainant confirmed that the radio interference reported previously was still occurring.

6. On October 2, 1998, Supervalu contacted the Seattle Field Office to ascertain the status of its STA request. As a courtesy, the Seattle Field Office contacted the WTB in Gettysburg to determine the status of the request, and subsequently left a message with Supervalu's corporate office, advising it that the STA request had been denied. The WTB also sent a copy of the STA denial letter, which had previously been mailed to Supervalu, via facsimile to the company's corporate office in Minnesota.

7. On October 5, 1998, an agent from the Seattle Field Office conducted a follow-up investigation and determined that Supervalu was still transmitting on 469.9625 MHz from 1525 East D Street in Tacoma, Washington without a valid station license or other authority. A review of the Commission's records revealed that no authorization had been granted for this station.

8. Based on the events described above, on October 8, 1998, the Seattle Field Office issued an NAL to Supervalu in the amount of \$11,000 for willful and repeated violations of Section 301 of the Act. The Bureau affirmed the amount by the *Forfeiture Order* issued on January 19, 1999.

DISCUSSION

9. In seeking reconsideration of this matter, Supervalu asserts (1) that it "did possess a valid FCC authorization" to use the frequency at issue, but admits that the license "was inadvertently permitted to expire prior to" the inspection on September 9, 1998; (2) that it "took all reasonable and necessary steps to bring its system into compliance," and "followed in good faith the advice provided by the [Commission's] staff," but claims that the WTB "impeded Supervalu's compliance" with the Commission's Rules by denying the STA; (3) that the reasons relied upon by WTB in denying Supervalu's STA request were inapplicable to Supervalu, due to an exception found in Section 90.159 of the Rules, 47 C.F.R. § 90.159; (4) that this matter did not involve intentional or egregious conduct that would justify imposition of "the maximum statutorily permitted forfeiture for Supervalu's first alleged violation;" and (5) that the Commission should consider the reasonableness of punishing Supervalu for using radio communications to protect the safety of the public," as it claims that the radios at issue were used by Supervalu to control inventory and protect food from spoilage.

10. We are not persuaded by Supervalu's arguments. As an initial matter, the claim that Supervalu "did possess a valid FCC authorization to utilize the frequency at issue, but that license was inadvertently permitted to expire prior to the ... inspection" is offered without evidentiary support that such an authorization existed. As noted above, a review of the Commission's records revealed that no authorization had been granted for the station at issue. During the inspection on September 9, 1999, the Seattle agent did note that a radio license for a different frequency and mode of operation was posted at the site. However, that license, which cannot be construed as authorization for the transmissions in question, was not even issued to Supervalu, but to its previous owner, West Coast Grocery.

11. Furthermore, the assertions that Supervalu took all reasonable and necessary steps to comply and followed the Seattle Field Office's advice "in good faith" but WTB "impeded Supervalu's compliance" are not true. The Seattle Field Office repeatedly warned Supervalu that it could be fined if it continued to operate the transmitter without a valid license, and advised Supervalu to discontinue its unlicensed radio transmissions immediately. Supervalu chose to ignore this advice. In light of the repeated warnings to discontinue its unlicensed operations immediately, Supervalu could not have reasonably believed it could continue to operate the radio facility based on the Seattle Field Office's suggestion that Supervalu file a request for an STA.

12. We further see no basis for mitigation in Supervalu's claim that denial of its request for an STA was in error. If Supervalu believed that WTB was wrong in denying its request for an STA, its arguments to that effect should have been raised with WTB at the time the STA was denied. The WTB had sole authority to grant or deny the request, subject to review at that time by the Commission, and we are therefore not in a position to opine on the validity of WTB's denial of the STA. In any case, Supervalu continued to operate the radios without an STA, even after it had been informed that an STA was required and that its request for the STA had been denied.

13. Finally, we turn to Supervalu's claims of mitigating circumstances to be taken into account pursuant to Section 503(b)(2)(D) of the Act. Supervalu claims that the radios at issue were used to control inventory and protect food from spoilage, and implies that it would therefore be unreasonable for the Commission to punish Supervalu for "using radio communications to protect the safety of the public." Supervalu also contends that the \$11,000 forfeiture amount is inappropriate because the conduct at issue was not egregious or intentional and that this incident was Supervalu's first alleged violation. These arguments are also unpersuasive. Supervalu is not being fined for its efforts to protect the public safety, but rather for using radio equipment without a license. Supervalu also fails to comprehend that the conduct at issue amounts to repeated, willful violations of the Act. Section 312(f)(2) of the Act provides, in pertinent part: "The term 'repeated,' when used with reference to the commission or omission of any act, means the commission or omission of such act *more than once*..." 47 U.S.C. § 312(f)(2). (Emphasis added.) On three separate occasions, the Seattle Field Office received complaints of interference to licensed radio transmissions, which the Field Office determined were caused by Supervalu's unlicensed and unauthorized operation of a radio transmitter. Furthermore, Section 312(f)(1) of the Act provides: "the term 'willful', when used with reference to the Commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission, authorized by this Act or by a treaty ratified by the United States."⁴ Supervalu was warned several times, both in writing and by telephone, that continued operation of its transmitter without a license could result in a fine, but still proceeded to operate the transmitter without valid authorization. Its violation was thus not only willful, but intentional.

⁴ See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387(1991).

ORDERING CLAUSES

14. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 1.106 of the Rules, Supervalu's petition for reconsideration of the Forfeiture Order, NAL No. 915ST0001, issued on January 19, 1999, **IS DENIED**.

15. **IT IS FURTHER ORDERED** that, pursuant to Section 503(b) of the Act and Sections 0.111, 0.311, and 1.80 of the Commission's Rules, 47 C.F.R. §§ 0.111, 0.311, and 1.80, Supervalu, Inc. must pay the amount of \$11,000 within thirty (30) days of the release date of this Order. Payment may be made by check or money order, drawn on an U.S. financial institution, payable to the Federal Communications Commission. Payment may also be made by credit card with the appropriate documentation.⁵ The remittance should be marked "NAL Acct. No. 915ST0001" and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days will be referred to the U.S. Attorney for recovery in a civil suit. 47 U.S.C. § 504(a).

16. **IT IS FURTHER ORDERED** that a copy of this Order shall be sent certified mail, return receipt requested, to Supervalu's counsel of record, Michael L. Higgs, Jr., Schwaninger & Associates, 1835 K Street N.W., Suite 650, Washington, D.C. 20006, with a copy to Supervalu, Inc.'s corporate office in Minneapolis, Minnesota.

FEDERAL COMMUNICATIONS COMMISSION

David H. Solomon
Chief, Enforcement Bureau

⁵ Payment of the forfeiture in installments may be considered as a separate matter in accordance with Section 1.1914 of the Rules, 47 C.F.R. § 1.1914. Requests for installment plans should be mailed to: Chief, Credit and Debt Management Center, 445 Twelfth Street, S.W., Washington, D.C. 20554. For information regarding credit card payments, the Chief, Credit and Debt Management Center, should be contacted at (202) 418-1995.